Opening Statement of Rep. Bob Barr
Subcommittee on Financial Institutions Legislative Hearing on
H.R. 3424, "Community Choice in Real Estate Act"

July 24, 2002

Mr. Chairman. Thank you for scheduling this hearing on H.R. 3424, a measure which I strongly support and am pleased to cosponsor.

Over the last two centuries, Congress has repeatedly and explicitly prohibited financial institutions from engaging in commercial activity. The National Bank Act of 1864 prohibited federally chartered banks from engaging in commercial activities.[1] This policy was strengthened during the Great Depression, when Congress moved to prohibit a single business entity from engaging in both commercial banking and investment banking businesses.[2] In 1956, the Bank Holding Company Act[3] limited the non-banking activities of multiple-bank holding companies and brought them under the control of the Federal Reserve Board, Subsequent legislative pronouncements have been clear and unequivocal, and are underpinned by an equally clear and immutable policy rationale: mixing baking and commerce would create market distortions that would unfairly benefit commercial banks, and introduce potentially devastating distortions into competitive commercial and financial markets.

As we all know, on January 3, 2001, that Federal Reserve Board and Treasury Department issued a proposed rule which would redefine financial activities to permit banks to compete in the real estate brokerage and management markets. H.R. 3424 would stop this proposed rule, and maintain the carefully balanced status quo set forth by Gramm-Leach-Bliley. Opponents of H.R. 3424 can point to no language in the Gramm-Leach-Bliley Act (GLBA) which delegates to federal agencies general authority to abrogate this fundamental and long-recognized principle. The text and legislative history of GLBA clearly demonstrates Congress intended the historic firewall between banking and commerce to be preserved, not destroyed. During congressional consideration of GLBA, Federal Reserve Board Chairman Alan Greenspan urged Congress to maintain the historic separation between commercial and financial activities. In testimony before this Committee, Chairman Greenspan stated:

> "As technology increasingly blurs the distinction among various financial products, it is already beginning to blur the distinctions between predominately commercial and banking firms…It seems to us wise to move first toward the integration of banking, insurance, and securities…and employ the lessons we learn from that important step before we consider whether and under what conditions it would be desirable to move to the second stage of full integration of commerce and banking. The Asian economic Crises last year highlight some of the risks

[1] 13 Stat. 99, 101, codified at 12 U.S.C. § 165 (2000)
[2] Glass-Steagall Act or The Banking Act of 1993, 89, 48 State. 162 (12 U.S.C. § 340-360, repealed).
[3] 70 Stat. 133, codified in scattered sections of 12 U.S.C. (2000).

> that can arise if relationships between banks are commercial firms are too close."[4]

Clearly, the advice of Chairman Greenspan was ignored by the Clinton Treasury Department, which noticed this proposed rule shortly after GLBA went into effect.

The Legislative history of GLBA further highlights the intent of Congress to place limits on the authority of the unelected of federal agencies to determine which activities are "financial in nature or incidental to financial activities." The Report states:

> "This authority includes authority to allow activities that are reasonably connected to one or more financial activities…[t]he authority provides the Board with some flexibility to accommodate the affiliation of depository institution with insurance companies, securities firms, and other financial service providers *while continuing to be attentive not to allow the general mixing of banking and commerce in contravention of the purposes of this Act*.[5]

Finally, former Chairman Jim Leach, a principal author of GLBA, stated:

> "Of all the things I am proud of in the modernization legislation, it is that our government's two principal financial bodies – the Treasury and the Fed stand with me against mixing commerce and banking. There should be no misunderstanding. If this precept had been included in the final legislative product, I would have done my best to pull the plug on financial modernization."[6]

The substantive merits of reversing the proposed rule are overwhelming, and the 245 cosponsors of H.R. 3424 clearly demonstrate the Treasury Department and the Federal Reserve are flouting the intent of Congress by proposing this rule. However, the grave flaws in this proposed rule are not confined to policy alone.

On May 16, 2002, the Judiciary Committee Subcommittee on Commercial and Administrative Law, which I chair, conducted a hearing on procedural and administrative aspects of the proposed rule. Specifically, the Subcommittee examined the following questions:

- Did the statute giving rise to the proposed rule provide sufficient congressional authority to transform the definition of "financial activity" without congressional consent?
- Was the language in GLBA sufficiently clear to provide a coherent basis upon which the respective agencies could make this determination?

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[4] Statement of Federal Reserve Chairman Alan Greenspan, Cong. Rec, S4626 (1997).
[5] S. Rep. No. 106-44, at 21 [available at http://thomas.loc.gov/cgi-bin/cpquery/R?cp106:FLD010:@1(sr044)].
[6] Press Release of Rep. Jim Leach, May 17, 2000.

- Can – *should* – Congress delegate its authority to regulate interstate commerce without any cognizable constraints on agency discretion?
- Did the issuing agencies provide a sufficient factual or legal basis for concluding that real estate brokerage and management are "financial activities?"
- Were the procedural requirements of the Administrative Procedure Act and the Regulatory Flexibility Act adequately observed?
- How will the agencies consider and act on the public comments they have received?
- How will the proposed rule affect consumer privacy?

During the course of the Subcommittee hearing, it became obvious the procedural bases on which the rule was issued were deeply flawed. Not only did the issuing agencies ignore the text and legislative history of GLBA, they totally disregarded relevant and applicable administrative procedures and precedents, but the overwhelming weight of public opinion against this rule as well.

Since the advent of the modern regulatory state, Congress and the President have continuously sought to craft an administrative process that treats all parties and all perspectives fairly. While we have striven to obtain the best possible agency rules, another, equally important purpose is to make the administrative process an open on that informs the American people about the actions of its government. The proposed rule does not advance this goal, it thwarts it. If finalized, the rule would substitute overwhelming public sentiment and the will of Congress with the arbitrary and capricious dictates of unelected agency bureaucrats.

The American people deserve better, and Congress has a responsibility to reverse this proposed rule by passing H.R. 3424. The last thing America needs is the additional financial uncertainty that finalization of this rule would invite. I wish again to thank the Chairman for scheduling a hearing on this important legislation and urge a speedy markup of this bill.